Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Huguenin, Leidigh, and Remy

From: Brian Lau, Commission Counsel, Legal Division
John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Prenotice Discussion of Amendment to Regulation 18944.2 – Gifts to an Agency

Date: December 26, 2006

I. EXECUTIVE SUMMARY

This memorandum addresses a proposed amendment to regulation 18944.2 relating to gifts made to a public official's agency under the Political Reform Act (the "Act").[1] The proposed amendment to regulation 18944.2 is presented to the Commission for prenotice discussion.

Gifts to certain public officials and candidates have been limited under the Act's provisions. Moreover, certain public officials and candidates who receive gifts are subject to gift reporting requirements and disqualification rules. However, in some circumstances, a gift used by an official may actually benefit the official's agency without providing any significant or unusual benefit to the official. In these circumstances, a gift is considered a gift to the agency, not to the public official(s) ultimately benefiting from the gift, if (1) the agency receives and controls the payment, (2) the payment is used for official agency business, (3) the agency determines the official(s) who shall use the payment, and (4) the agency memorializes the payment in a written public record. (Regulation 18944.2.)

The proposed amendment to regulation 18944.2 clarifies that a gift to an agency may still fall within the purview of regulation 18944.2 even when the donor makes a monetary payment for goods or services directly to the vendor of the goods or services so long as the agency receives and controls the use of the goods or services.

II. BACKGROUND

The Act places certain restrictions and reporting requirements on the receipt of gifts by public officials and candidates. Generally, section 82028(a) defines a "gift" as:

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[1] Government Code sections 81000-91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

> "[A]ny payment that confers a personal benefit on the recipient to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status."

For gifts made by lobbyist, section 86201 defines a "gift" as:

> "[A] gift made directly or indirectly to any state candidate, elected state officer, or legislative official, or to an agency official of any agency required to be listed on the registration statement of the lobbying firm or the lobbyist employer of the lobbyist."

Gift Limits: Section 89503 prohibits certain public officials and candidates from receiving gifts of $360[2] or more in a calendar year from anyone who may influence the public official's actions. Additionally, certain public officials and candidates may not accept gifts from a lobbyist or a lobbying firm that total more than $10 in a calendar month. (Section 86203.)

Gift Reporting Requirements: Under the Act, public officials and candidates specified in section 87200 or designated in their agency's conflict of interest code must report gifts received from a single source within a calendar year that total $50 or more. (Sections 87207(a)(1) and 87302(b).)

Disqualification Rules: Section 87103(e) prohibits any public official from using his or her position to influence the outcome of a decision involving the donor of gifts valued at $360 or more. Under this provision, a public official is disqualified from making, participating in making, or influencing any decision having a reasonably foreseeable material financial effect on the donor of gifts valued at $360 or more.

Despite the Act's gift limits, gift reporting requirements, and disqualification rules, in some circumstances, a gift used by an official may actually benefit the official's agency without providing any significant or unusual benefit to the official. In these circumstances, the Commission has determined that the gift to the agency would not be considered a gift to the official who used the gift and the official would have no reporting obligation since whatever the official received would be analogous to reimbursement for expenses or per diem from a state or local government agency.[3] (*In re Stone* (1977) 3 FPPC Ops. 52).

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[2] The gift limit, currently $360, is adjusted every two years to reflect changes in the Consumer Price Index and will be adjusted to $390 on January 1, 2007.

[3] Reimbursement for expenses or per diem from a state or local government agency are not reportable pursuant to section 82030(b)(2).

While the *Stone* opinion specifically examined gifts of travel, meals, and accommodations, the rule enunciated has been applied broadly. In 1987, the Commission codified the *Stone* opinion in regulation 18726.7[4], but only in connection with passes or tickets to an official's agency, excluding passes or tickets for travel or lodging. Notwithstanding regulation 18726.7, advice letters expanded the rule enunciated further to include not only gifts of travel, meals, and accommodations, but other gifts received by an agency in the form of services and benefits.[5] Due to the limited scope of regulation 18726.7, the Commission reexamined the *Stone* opinion in 1994 and adopted regulation 18944.2 applicable to all gifts to an agency.[6]

Regulation 18944.2 provides a four-prong test for determining when gifts are considered gifts to an agency, not to a public official. In pertinent part, regulation 18944.2 states that a payment, which is a gift as defined by section 82028, is a gift to a public agency if the following requirements are met:

> "(1) The agency receives and controls the payment.
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> "(2) The payment is used for official agency business.
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> "(3) The agency, in its sole discretion, determines the specific official or officials who shall use the payment. However, the donor may identify a specific purpose for the agency's use of the payment, so long as the donor does not designate the specific official or officials who may use the payment.
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> "(4) The agency memorializes the payment in a written public record which embodies the requirements of subdivisions (a)(1) to (a)(3) of this regulation set forth above and which:
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> "(A) Identifies the donor and the official, officials, or class of officials receiving or using the payment;
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> "(B) Describes the official agency use and the nature and amount of the payment; and
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> "(C) Is filed with the agency official who maintains the records of the agency's statements of economic interests where the agency has a specific office for the maintenance of such statements, or where no specific office exists for the maintenance of such statements, at a

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[4] The Commission subsequently renumbered regulation 18726.7 to regulation 18944.1.

[5] See *Staff Memorandum to Commission, Discussion of Proposed Regulation 18944.2 (The Stone Opinion)*, dated January 24, 1994.

[6] Note, however, that regulation 18944.1 specifically controls the gifts to an agency of passes or tickets (excluding passes or tickets for travel and lodging).

designated office of the agency, and the filing is done within 30 days of the receipt of the payment by the agency."

Additionally, section 82044 defines the term "payment" as:

> "[A] payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services, or anything else of value, whether tangible or intangible."

III. PROPOSED REGULATION

The Technical Assistance Division has identified a reoccurring question of whether the donor of a gift of airfare or lodging to an agency must make the payment for the airfare and lodging to the agency or whether the payment can be made directly to the provider of the airfare or lodging, for example the airline or a hotel.[7]

Subdivision (a)(1) currently provides that a payment must be "received and controlled" by the agency. An agency "receives" a payment when the agency has possession of the payment and "controls" a payment by taken action to exercise control over the payment. (*Staff Memorandum to Commission, Discussion of Proposed Regulation 18944.2 (The Stone Opinion)*, *supra*.) As analyzed by staff at the time of adoption, the term "received" includes both actual and constructive possession. Constructive possession is commonly defined as the control or dominion over property without actual possession or custody of it. (See *Black's Law Dictionary* (7th ed. 1999) p. 1183, col. 2.)

Section 82044 defines the term "payment" as:

> "[A] payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services, or anything else of value, whether tangible or intangible."

As shown above, section 82044 defines the term "payment" as anything of value whether tangible or intangible. Where a payment is intangible, it would be impossible for an agency to have actual possession. This impossibility further supports staff's analysis that an agency with constructive possession of a payment has received the payment.

Where a donor makes a monetary payment for goods or services to a third party, under the language of the existing regulation, there is a question as to whether the "receive and control" test of subdivision (a) applies to the monetary payment to the vendor or to the goods or services provided as a result of the monetary payment.

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[7] Although the Technical Assistance Division has identified the issue in the context of gifts of airfare or lodging, there is an identical potential for confusion with the gift of any goods or services to an agency. If the Commission chooses to clarify regulation 18944.2 as recommended, there is no reason to limit the clarification to the gifts of airfare and lodging, and staff recommends a clarification applicable to all gifts of goods or services.

Several previous advice letters have examined the application of regulation 18944.2 to gifts of goods or services to an agency and concluded that the goods or services could fall within the purview of regulation 18944.2. (See *Parker* Advice Letter, No. I-01-057, refrigerator lent to agency may be gift to agency under regulation 18944.2; and, *Gould* Advice Letter, No. I-95-320, a lobbyist employer's payment of wages to a veterinarian to perform staff work for the California Legislature will be gift to legislature if the requirements of regulation 18944.2 are met.) In these letters, for purposes of regulation 18944.2 the payments to the agencies were the goods or services provided by the donors, not the monetary payment made to the vendors of the goods or services. The fact that the goods or services provided were considered the payment to the agency, not the monetary payment to vendor of the goods or services, is consistent with the definition of "payment" provided by the Act.

Therefore, the proposed regulatory amendment would provide that a gift to an agency may still fall within the purview of regulation 18944.2 even when the donor of goods or services makes a monetary payment to a vendor of the goods or services if the agency receives and controls the use of the goods or services. In other words, there is no distinction between receiving and controlling a payment and receiving and controlling the use of goods or services because the Act defines the term "payment" to include goods or services.

As an example, when an agency receives an intangible service, such as a payment for airfare, the constructive possession of the payment satisfies the "receive and control" test of subdivision (1)(a). More specifically, if a donor offers an agency free airfare for three to a governmental meeting overseas and the agency accepts the donor's offer independently selecting the three officials who will make the trip, the donor can then purchase the tickets in the name of the three officials directly from the airfare provider. Under this example, the agency received the payment because it had constructive possession of the payment, the free airfare, and controlled the use of the payment by independently selecting the officials making the trip.

If circumstances indicate that the donor intends for any particular official to benefit from the payment (for example the donor purchases airline tickets in the name of the officials prior to offering the tickets to the agency), the agency has not received the payment, as the agency never had constructive possession, nor controlled the payment pursuant to subdivision (a)(1). Additionally, if the donor indicates any intent that a particular official benefit from the payment, the payment falls out of the exception for gifts to an agency under subdivision (a)(3) because the agency, in its sole discretion, must determine which officials will use the payment.

Staff proposes the following amendment to subsection (a)(1) of regulation 18944.2:

> "The agency receives and controls the payment. <u>For purposes of this section, an agency receives and controls a payment even when a monetary payment for goods or services, including airfare and lodging, is</u>

> made directly to the vendor of the goods or services so long as the agency receives and controls the use of the goods or services."

As drafted, the proposed amendment does not alter the Commission's current analysis of gifts to an agency, but merely clarifies the Commission's longstanding interpretation of regulation 18944.2. Additionally, staff has made several non-substantive changes to regulation 18944.2 for consistency with other regulations in the Act. Specifically, the terms "section" and "article" are no longer capitalized and citations to Commission opinions have been italicized.

IV. STAFF RECOMMENDATION

Staff proposes noticing the proposed amendment to regulation 18944.2 for adoption at the March 2006 Commission Meeting.

Attachment

Proposed regulation 18944.2